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82-755
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALICE TOOMEY,
Respondent,

v.

JAMES MICHAEL TOOMEY,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Missouri

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QUESTION PRESENTED

Whether the decision of the Supreme Court of Missouri (two judges dissenting), which treats spouses who divorce and remarry each other and then divorce again as a class separate from spouses who divorce and marry new partners and then are divorced, and which requires spouses in the former class to pay larger maintenance awards upon their second dissolution of marriage than similarly circumstanced spouses in the latter class only because they are again divorcing their original spouse, invidiously discriminates against spouses in the former class in violation of their rights under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

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ALICE TOOMEY,
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To the Supreme Court of Missouri

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Missouri entered on July 6, 1982.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Missouri is reported at 636 S.W.2d 313 and is printed in Appendix A hereto, *infra*, p.p. A-1 to A-10. The opinion of the Missouri Court of Appeals for the Eastern District of Missouri is not reported and is printed in Appendix B hereto, *infra*, p.p. A-11 to A-16. The Decree of Dissolution of Marriage of the Circuit Court of St. Louis County, Missouri, is not reported and is printed in Appendix C hereto, *infra*, p.p. A-17 to A-20.

JURISDICTION

The judgment of the Supreme Court of Missouri was entered on July 6, 1982. Petitioner's Motion for Rehearing was duly and timely filed in said Supreme Court of Missouri. Said Motion for Rehearing was denied on August 2, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment XIV, Section 1. The said United States Constitution, Amendment XIV, Section 1 provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 452.335 R.S.Mo. 1978. The said Section 452.335 R.S.Mo. 1978 provides:

> "1. In a proceeding for nonretroactive invalidity, dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order to either spouse, but only if it finds that the spouse seeking maintenance

(1) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and

(2) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

2. The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:

(1) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(2) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(3) The standard of living established during the marriage;

(4) The duration of the marriage;

(5) The age, and the physical and emotional condition of the spouse seeking maintenance;

(6) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance; and

(7) The conduct of a party seeking maintenance during the marriage."

STATEMENT OF THE CASE

The judgment which gives rise to the within Petition dissolved a marriage between the parties that lasted less than three years. This was their second marriage to each other. Their first marriage was terminated by a decree entered by a Connecticut court in 1975. That first marriage of the parties had lasted over twenty years.

The parties were married for the second time on August 31, 1976. On November 16, 1977, Respondent herein (hereinafter "Mrs. Toomey") filed a petition in the Circuit Court of St. Louis County, Missouri to dissolve this second marriage. On July 27, 1979, the cause came on for hearing in the trial court.

At the time of the hearing, both of the parties were forty-nine years old. Petitioner herein (hereinafter "Dr. Toomey") was a licensed physician teaching at Washington University in St. Louis. Mrs. Toomey was employed part-time as a hostess in a restaurant. She had been a registered nurse, licensed in Connecticut, but she had not practiced for twenty-two years, and her license had expired. She testified that she had not been happy in the profession and that she did not intend to continue in that field. Four of the six children born during the first marriage of the parties were still minors at the time of the hearing.

Mrs. Toomey testified during the hearing regarding her income, her financial needs, and the relief she was seeking (including maintenance and child support). During her testimony, the following exchange took place among Mr. Cofman, then counsel for Mrs. Toomey, Mrs. Toomey, Mr. Seigel, counsel for Dr. Toomey, and the trial judge:

> "Q. (By Mr. Cofman) Is there anything unusual about your financial situation, presently, that you feel the Court should know about?

"A. Yes. I think that my husband feels that I am asking for too much. However, I have invested 25 years of my life in this marriage and the children and I —

"MR. SEIGEL: I am going to object your Honor. This is a three-year marriage.

"THE COURT: Sustained. Ma'am, your present marriage took place in 1976, is that correct?

"THE WITNESS: That's right.

"THE COURT: You are actually at this time, legally only married about three years.

"THE WITNESS: Legally, yes.

"Q. (By Mr. Cofman) Okay. There was a prior period of time which I have already stipulated that you had been married, which marriage was your first marriage?

"A. That's right, with the same man.

Q. And it was because of that first marriage that you gave up your career and went on —

MR. SEIGEL: I am going to object to what happened in the first marriage, your Honor.

"THE COURT: Sustained."

Following the hearing, the trial court entered a decree dissolving the marriage of the parties (Appendix C hereto, *infra*, p. A-17). Pursuant to said decree, Mrs. Toomey was awarded maintenance in the sum of $350 per month for a term of five years, which coincides with the youngest child of the parties reaching twenty-one. She was awarded custody of the minor children of the parties, and Dr. Toomey was ordered to pay child support for said children, including the cost of their private school and college educations. The parties were ordered to sell the family home within six months and divide the net proceeds equally. Dr. Toomey was awarded his pension plan.

Thereafter, Mrs. Toomey filed her appeal from said decree, challenging the child support order as well as the maintenance award and the property division. On June 16, 1981, the Missouri Court of Appeals rendered its opinion (Appendix B, *infra*, p. A-11) wherein it sustained Mrs. Toomey's attack on the child support order, and, because of the interdependent nature of the decree, remanded the case to the trial court to take additional evidence with respect to the nature and extent of marital property, maintenance and child support. In so doing, the appellate court, *sua sponte*, addressed the question of the duration of the subject marriage. The Court concluded as follows:

> "We are of the opinion that remarriage between the same parties after a divorce is a continuation of the marriage so that 'the duration of the marriage' as one of the elements in determining the amount of maintenance, § 452.355.1(4) R.S.Mo. 1978,[1] encompasses all of the time during which the parties were husband and wife."

Dr. Toomey timely sought a rehearing before the Court of Appeals and in his Suggestions to that Court he challenged the foregoing ruling on the ground, *inter alia*, that it unfairly and improperly distinguished between categories of ex-spouses without a legal or factual basis for making that distinction. After the Court of Appeals denied Dr. Toomey's Motion for Rehearing, he timely filed his Application to Transfer in the Supreme Court of Missouri, and that Court accepted said application in order to consider whether "the fact of a prior mar-

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[1] Although the Court cited § 452.355.1(4), the correct citation is § 452.335.1(4).

riage between the parties [is] a relevant factor for the trial court to consider in awarding maintenance."[2]

In his Supplemental Brief on Transfer Dr. Toomey again attacked the ruling of the Court of Appeals on the ground, *inter alia*, that it unfairly and improperly served to discriminate between domestic relations litigants who were otherwise similarly situated.

Over the dissent of two of its members, a majority of the Missouri Supreme Court, in its Opinion of July 6, 1982, (Appendix A, *infra*, p. A-1) held that evidence of a first marriage between the parties (such as the duration of the same) is relevant to determine the amount of maintenance to be awarded and the period of time over which it is to be paid upon a dissolution of their second marriage, and the Court ordered the case remanded to the trial court to take into consideration such factors.

Dr. Toomey timely filed his Motion for Rehearing in the Missouri Supreme Court, again raising the contention that said ruling unfairly discriminated against similarly situated domestic relations litigants, specifically citing the same as a violation of his right to equal protection under law as guaranteed by the United States and Missouri Constitutions, as amended. Said Motion for Rehearing was denied by the Supreme Court of Missouri on August 2, 1982.

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[2] The Supreme Court also reviewed the ruling of the Court of Appeals regarding the child support order. It reversed the decision of the appeals court on that issue, and upheld the trial court's child support order. Mrs. Toomey has not challenged that decision.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Missouri in the instant case has been rendered in total disregard of the obvious injury it causes to Dr. Toomey's right to equal protection of the law as guaranteed to him by the Fourteenth Amendment to the Constitution of the United States. The Missouri court, by concluding that evidence of a first marriage between parties is relevant to deterine the amount and duration of maintenance to be awarded upon the dissolution of the second marriage between the same parties, has artificially created a spurious subclassification within the group of individuals who experience a second dissolution of marriage that is wholly unwarranted and unjustifiable and that unfairly and invidiously discriminates against those individuals who are placed within that fictitious subclass.

The Supreme Court of Missouri has concluded that a prior marriage between the same parties (and the duration of the same) is a relevant factor to consider in determining a maintenance award when those parties dissolve their second marriage. In reaching this conclusion, that Court has arbitrarily established two classifications of spouses who are seeking their second dissolution of marriage. The first class created by that Court is made up of those spouses who are dissolving their second marriage to each other. The second class created by that Court is made up of persons who have dissolved their first marriage, married a new partner, and are now dissolving that second marriage. In its decision, the Missouri court has decided that members of the former class shall be treated differently (and less favorably) than members of the latter class even though all are similarly circumstanced. This differentiation is without any rational basis, and therefore, it constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

In determining a maintenance award, Missouri trial courts are guided by the provisions of § 452.335 R.S.Mo. 1978. That statute reads as follows:

"452.335. Maintenance order when jurisdiction lacked—finding required for

1. In a proceeding for nonretroactive invalidity, dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order to either spouse, but only if it finds that the spouse seeking maintenance

(1) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and

(2) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

2. The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:

(1) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(2) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(3) The standard of living established during the marriage;

(4) The duration of the marriage;

(5) The age, and the physical and emotional condition of the spouse seeking maintenance;

(6) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance; and

(7) The conduct of a party seeking maintenance during the marriage."

In its decision in the case at bar, the Missouri Supreme Court has now for all intents and purposes modified the fourth listed factor, "The duration of the marriage", to read "The duration of the marriage if the parties have not been previously married to each other, but the duration of the marriages if the parties have remarried each other." In so doing, the Court has distinguished between and classified into groups those spouses who are dissolving their second marriage. The Missouri court has placed into one group those spouses who are dissolving their second marriage to each other. The Court has placed into the other group those spouses who are dissolving a second marriage, such second marriage being with a new partner. It is this designation of the first group as an artificial subclassification among the class of all people who experience a dissolution of a second marriage which clearly deprives Dr. Toomey and others like him of equal protection under the law.

This Court has consistently held that a classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Eisenstadt* v. *Baird,* 405 U.S. 438, 447, 31

L.Ed.2d 349, 359 (1972), quoting from *Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415, 64 L.Ed. 989, 990 (1920). "The Equal Protection Clause 'imposes a requirement of some rationality in the nature of the class singled out.' " *James* v. *Strange,* 407 U.S. 128, 140, 32 L.Ed.2d 600, 610 (1972), quoting from *Rinaldi* v. *Yeager,* 384 U.S. 305, 308-309, 16 L.Ed.2d 577, 580 (1966). And as was stated by this Court in *Yick Wo* v. *Hopkins,* 118 U.S. 356, 373-374, 30 L.Ed. 220, 227 (1885):

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Section 452.335 R.S.Mo. 1978 is neutral on its face. It makes no distinction between those spouses who remarry each other and those spouses who enter a second marriage with a new partner. However, in the instant case, the Supreme Court of Missouri has placed an interpretation upon said statute which, by judicial fiat, imposes just that artificial distinction between those purported groups. The Court then goes one step further, and having made said distinction, treats the members of the former group differently, and less favorably, than the members of the latter group. Thus, even though § 452.335 does not distinguish between any domestic relations litigants, as applied by the Supreme Court of Missouri in the instant case, that statute now discriminates between groups of spouses who are getting a second divorce. As this Court held in *Yick Wo* v. *Hopkins, supra,* this kind of unequal application of the law falls squarely within the prohibition of the Equal Protection Clause.

On its face, § 452.335.1(1) advises that the purpose of a maintenance award granted thereunder is to provide for the "reasonable needs" of the recipient spouse who lacks sufficient property and appropriate employment to provide for such needs. The Supreme Court of Missouri has declared that the "primary purpose" of maintenance "is to provide subsistence for the spouse." *Dyche* v. *Dyche,* 570 S.W.2d 293, 296 (Mo. en banc 1978). And it has been held that the statute evinces "a legislative intent to remove any punitive quality as to the party providing maintenance . . . There is a new emphasis on the self-sufficiency of both parties following the dissolution." *Brueggemann* v. *Brueggemann,* 551 S.W.2d 853, 856-857 (Mo.App. 1979).

In light of the purpose of § 452.335, it is impossible to perceive any ground or reason having a "fair and substantial relation to the object" of § 452.335 that justifies the Missouri Supreme Court's designation of a separate classification for those persons seeking to dissolve a second marriage with their original spouse as distinct from those persons seeking to dissolve a second marriage with a second spouse.

The purpose of § 452.335 is to assure that "the reasonable needs" of a spouse receiving maintenance will be met. In the case of a man and woman who are about to dissolve the second marriage for both of them, the "reasonable needs" of the spouse who receives maintenance upon such dissolution will arise independently from the fact that he/she is divorcing his/her original spouse rather than a second spouse. By way of illustration, if A marries B, subsequently divorces B, later re-marries B, and then dissolves that second marriage, while at the same time, C marries D, later divorces D, thereafter marries E, and then dissolves that marriage, and if all of the other factors contemplated by § 452.335 are equal (i.e., the duration of the second marriages is the same, the parties are similarly

employed, the parties are the same age and in the same state of health, the parties have the same number of children, and the parties have the same income and property), there is no justification, in light of the purpose of the statute or otherwise, for treating A's request for maintenance any differently than C's request. Accordingly, there is also no justification for considering B's obligation to pay maintenance as being any different than E's obligation. Yet under the terms of the opinion under question, the mere fact that A is again divorcing his/her original spouse is sufficient to upset the balance between A and C and entitle A to a different (and more lucrative) award than C, i.e., A receives some maintenance, more maintenance, or maintenance for a longer period, while C receives no maintenance, less maintenance, or maintenance for a shorter period. That result does not arise out of a difference in the reasonable needs of A and C. It comes about *only* because A remarried B while C chose E as a second spouse. Clearly, that difference bears absolutely no relationship, substantial or otherwise, to the purpose of § 452.335. Accordingly, to treat B differently than E, even though the actual financial needs of A and C are the same, amounts to placing B in an arbitrary, unfair and unreasonable classification, separate and distinct from others similarly circumstanced, i.e., all individuals who are dissolving a second marriage, without any basis in rationality.

The foregoing illustration also demonstrates that the decision of the Missouri Court not only discriminates *against* spouses who must *pay* maintenance following the dissolution of their second marriage to their original spouse, but it also discriminates in *favor* of spouses who *receive* maintenance following the dissolution of their second marriage to their original spouse. Thus, in terms of the illustration, all other factors being equal, C will always receive less maintenance than A even though their actual financial needs are the same. This discrimination against C is no more permissible than the discrimination suffered by B.

The foregoing vividly demonstrates the uneven and capricious application of §452.335 that arises out of the decision of the Supreme Court of Missouri herein. As a result of that opinion, persons like Dr. Toomey who remarry their former spouse and thereafter go through a dissolution of that second marriage will henceforth be regarded as having been a party to a much longer marriage than persons who end their original marriage, marry another person and thereafter dissolve that second marriage. Although the only difference between the two groups is in the identities of the parties to the respective marriages (a difference that bears no relationship to the purpose of §452.335), spouses in the former group, like Dr. Toomey, will be ordered to pay more maintenance for longer periods of time than spouses in the latter group.[3]

As demonstrated by the foregoing, the decision of the Supreme Court of Missouri distinguishes between those spouses who divorce and remarry each other, and then divorce again, and those spouses who divorce and marry another person, and

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[3] See, *Elliott* v. *Elliott*, 621 S.W.2d 305 (Mo. App. 1981). In that case a man and woman, each of whom had been previously married to another person, were married for four years. Husband was an attorney, wife did not work. Each brought their own property and children to the marriage. On these facts, notably similar to the circumstances in the case at bar except for the identities of the prior spouses, the trial court declined to award the wife continuing maintenance "such as might be justified by a *long* marriage." *Id.* at p.308. (Emphasis supplied) The Missouri Court of Appeals approved the trial court's reasoning and application of the law, and the Supreme Court of Missouri declined to review the decision. In light of the decision in *Elliott*, it is clear that if Mrs. Toomey had married another man instead of remarrying Dr. Toomey, the courts of Missouri would have regarded her second marriage as one of short duration, and any maintenance award arising therefrom would have been calculated accordingly.

then dissolve their second marriage. After making that distinction, the opinion discriminates against the spouses in the former group by calling upon them to pay more maintenance for a longer period of time than their counterparts in the latter group. The sole reason for this difference bears no relationship to the needs of the spouse who will receive the larger maintenance payments; it rests exclusively on the identity of the spouse who will make those payments. Inasmuch as the distinction made between the groups bears no relationship, reasonable or otherwise, to the statutory purpose for awarding maintenance payments, the discrimination resulting therefrom is an invidious and impermissible one that is prohibited under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari be granted.

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APPENDIX A

SUPREME COURT OF MISSOURI
EN BANC

No. 63433

In re The Marriage of: Alice Toomey,
Appellant,

vs.

James Michael Toomey,
Respondent.

(Filed July 6, 1982)

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
Honorable Arthur Litz, Judge

This case was transferred from the court of appeals, eastern district, after opinion. This court granted transfer on the husband's application to consider two questions: 1) is a support award that provides for the husband to pay all educational expenses of children and sets a minimum figure unenforceable by execution and thus void; 2) is the fact of a prior marriage between the parties a relevant factor for the trial court to consider in awarding maintenance? Portions of the court of appeals opinion are used here without quotation marks.

The parties had been married for more than twenty years prior to their 1975 divorce in Connecticut.[1] Six children were born during this marriage. They remarried in Missouri on

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[1] The exact date of the original marriage and of the divorce do not appear in the record.

August 31, 1976. Wife filed a petition for dissolution on November 16, 1977, which was amended July 24, 1979. Four of the children were minors at the time of trial in the present action. Judgment was entered July 30, 1979.

At the time of trial, both parties were forty-nine years old. Respondent husband is a licensed physician employed by Washington University at Barnes Hospital and by the City of St. Louis at City Hospital. His gross income is $62,215.46. His monthly take-home pay after deductions which include $19.50 for life insurance and a $329.58 contribution toward a pension plan is $3,323.61. The $329.58 pension contribution is matched by Washington University. Wife is employed part-time as a hostess in a restaurant. Her gross income per month is $396.00 and her take-home pay is $314.00 per month. Husband's ordinary living expenses are approximately $1,509. Wife's estimate of her ordinary living expenses is $1,569. The cost of support for the four children is not clear. Wife listed $2,181 per month which allotted $691 to educational expenses. Husband put educational expenses at $645.53 per month. Wife's estimate of expenses for the children was incorrect in that it included the cost of food for one of the emancipated children who was living with her.

The principal items of property are the family residence and husband's interest in the pension plan. The residence has a value of $140,000 to $170,000, subject to a deed of trust of $40,000. Husband's testimony was that the pension plan was "the California type" (with no explanation as to what he meant), that it shows "a total of $39,849", that it is designed for retirement at age 65 and that "you cannot borrow or take it out." There is nothing in the record as to how the $39,849 figure was arrived at, nor is there a copy of the pension plan or any of its provisions. Husband is indebted to a bank upon a note for $29,400. Other property consists of a checking account, automobiles, and household furnishings.

Wife had been a registered nurse, licensed in Connecticut. She has not practiced her profession for 22 years and her license apparently has expired. She had not been happy in the work and does not intend to follow the profession in the future. The trial court took judicial notice that reciprocity existed between Connecticut and Missouri respecting nurses. Husband testified that refresher courses in nursing are available to persons whose licenses have expired. There was no direct evidence of the status of wife's license, no evidence of availability of positions, and no evidence with respect to the income a nurse could expect to receive. She testified that she was content with her present employment because it allowed her to be with the children who were still at home.

The trial court awarded maintenance to the wife in the sum of $350 per month for a period of five years, which coincides with the youngest child reaching twenty-one. In dividing the property, the court ordered the residence be sold for at lea[illegible]150,000 within six months and the net proceeds divided equally;[1] the pension fund, which had accumulated solely during the second marriage, was set aside to the husband without indicating whether or not it was marital property. The court granted custody of the minor children to wife and made an award of $150 per month as support for each of the four minor children ($600 total). The court made an additional award for support which requires the husband to pay all educational expenses.

Wife appeals the educational expense award which reads in part as follows:

> In addition, Respondent to pay for each child all private school or college tuition and housing costs, said sum to total no less than $665 per month; said sums to be paid directly to the respective educational institutions at such time as Respondent receives statements therefor.

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[1] This order has been stayed during the appeal.

Petitioner wife asserts this order is void because the amount is too indefinite to be enforced by execution and, furthermore, invades the right of the custodial parent to determine how child support is to be allocated.

A trial court has broad discretion and flexibility in fashioning child support payments. The court must make an order that accommodates the needs of the minor children and the ability of the parents to meet those needs. Matheus v. Matheus, 612 S.W.2d 907, 908 (Mo. App. 1981); Allison v. Allison, 540 S.W.2d 635, 636 (Mo. App. 1976). It is apparent from the order that the trial court sought to make this accommodation.

At the time of trial, three of the minor children attended school.[3] The youngest two were in private high schools and one was in college. Dr. Toomey was paying an average of $665 a month for tuition and other expenses. Mrs. Toomey in her testimony indicated that she did not want to change the schools the children were attending, but wanted the money paid directly to her.[4] "I believe in education, but as far as that amount [$665] I think it is overdone." She testified that she wanted the children to get financial aid "because there is so much available now . . . ." Dr. Toomey tesified that he wanted to and was able to pay for the education expenses of any of the children. His testimony indicated that if his children wanted to attend college he would pay all expenses for the colleges his children selected. Also, his employer Washington University will pay up to $2300 annually for tuition for each child at any college or university.

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[3] The other minor child was unemployed and living at home. One of the emancipated children also lived at home.

[4] "Q. And what you are telling the Court is that you would prefer that these payments be made to you in the form of maintenance or alimony, rather than being made in the furtherance of an unnecessary expense for education, is that right?

A. Right."

We do not find that paying the money directly to the respective institutions interferes with the right of the custodial parent to make education decisions. The minimum amount due was for the amount currently paid by Dr. Toomey to the institutions the children were attending. The order to pay the institutions directly is sensible. In this manner, Dr. Toomey can make arrangements with the institutions of the best means to meet the expenses. Furthermore, many items of child support are made directly to a third party and it is within the discretion of the trial court to order accordingly. *E.g.*, In re Lineberry, 9 Bankr. 700, 706 (W.D. Mo. 1981) (payments to orthodontist); Niederkorn v. Niederkorn, 616 S.W.2d 529, 539 (Mo. App. 1981) (payment to medical insurance company); Biggs v. Biggs, 397 S.W.2d 337, 338 (Mo. App. 1965) (payments for private school tuition and camps).

The question remains whether the order is so indefinite as to the amount owed to be unenforceable by execution and thus void. The respondent was ordered to pay all tuition and housing costs, "said sum to total no less than $665 per month." As discussed above, the $665 figure represents the average monthly sum respondent was paying at the time of trial for the children's education.

Loomstein v. Mercantile Trust National Ass'n, 507 S.W.2d 669 (Mo. App. 1974) and Taylor v. Taylor, 367 S.W.2d 58 (Mo. App. 1963), cited by appellant to support this contention, are distinguishable. In *Loomstein*, the provision to be enforced was that the father pay all college expenses without mentioning any sum or method of computation. The court held this to be unenforceable by execution, but added that the provision could well be a contractual obligation. *Taylor* was an attempt to enforce an alimony provision (25% of net income) under the old divorce law. Both cases are of questionable authority after the decision in Bryson v. Bryson, discussed below and Payne v. Payne, No. 63664 (Mo. banc June 8, 1982).

A similar argument was made in Bryson v. Bryson, 624 S.W.2d 92 (Mo. App. 1981). There, the husband was to pay the wife maintenance of $350 a month "or a sum equal to 33 percent of respondent's gross income from wages, whichever was greater." *Id.* at 94. This provision had been part of a separation agreement incorporated into the decree and thus was enforceable as a judgment. The court of appeals held that, although the amount of maintenance award was "facially uncertain," the maintenance provision was valid because the trial court upon motion could determine the amount due. Although *Bryson* involved a maintenance rather than a child support award, the philosophy of the court in finding a method to enforce a decree is applicable here.

The order entered by the court is the *minimum* amount for which Dr. Toomey is obligated. He, of course, can pay more than this amount and from his testimony, it appears that it is his intention to pay more if the educational expenses are greater than $665 a month. If, however, Dr. Toomey fails in his obligation, Mrs. Toomey can bring an action on the judgment for $665 a month. If the expenses for education exceed $665, Mrs. Toomey can move in the trial court for modification of the order and introduce evidence of those increased expenses.

We hold that the order for child support is valid and affirm that portion of the trial court's judgment.

The remaining points on appeal concern whether the trial court erred in the division of property and in the amount of maintenance. For the reasons discussed below, the property division and maintenance awards are reversed and remanded.

This case presents an unusual factual situation. The parties had been married for more than twenty years during which time six children were born. They were divorced in 1975 in Connecticut. The Connecticut divorce decree provided that the family home was to be sold when the youngest child graduated from high school at which time the proceeds were to be divided equally

between the parties. Before the house was sold pursuant to the divorce decree, the parties remarried and moved to Missouri.[5] The Connecticut house was then sold and the proceeds invested in the Missouri home. It is this house that is one of the two principal items of property owned by the parties.

During trial, Mrs. Toomey's attorney attempted to elicit testimony from her that she had been a homemaker during both marriages to illustrate her need for maintenance. Dr. Toomey's objection was promptly sustained with the trial judge commenting, "You are actually at this time, legally only married about three years." This exclusion of testimony was, in the circumstances of this case, error. Once the court determined maintenance should be awarded to the wife, § 452.335.1, RSMo 1978, the court in determining the amount of such award and for what period of time, was to consider "*all* relevant factors," § 452.335.2 (emphasis added), not merely the seven enumerated factors. During trial, other evidence of events occurring during or as a result of the first marriage was introduced without objection when it was relevant. The six children were all born during the first marriage. This was relevant to the issue of child support. The family home was bought with the proceeds from the sale of the Connecticut home. This was relevant to the property division. Dr. Toomey introduced evidence of Mrs. Toomey's nursing license as relevant to her ability to support herself. Where, as here, children were born of the first long-term marriage and the wife was the homemaker, the financial, social and employment status of the parties has been influenced by the totality of their relationship. Under the circumstances before us, evidence of that first marriage is relevant to determine the amount of maintenance and for what period of time.

---

[5] We were unable to discover any agency or source that keeps statistics on the incidence of second marriages between the same parties. We have no reliable information on how often this occurs in Missouri or in the United States generally.

In connection with further proceedings in the trial court, we note that one of the major items of property is Dr. Toomey's pension plan through Washington University to which he and his employer each made monthly contributions of over $300 during the second marriage. The trial court set the pension plan aside to Dr. Toomey without making a determination in the record whether the pension is separate or marital property and without any support in the record we can find on which to base a determination either way. This is error because there is no method for determining on the record if the property division is equitable. On rehearing the parties are to furnish the trial court with a more accurate description of the pension plan and the husband's interest therein so the court can determine what sort of property it is and what the division, if any, should be.

That portion of the judgment pertaining to maintenance award and the property disposition is reversed and the cause is remanded for further proceedings in accordance with the foregoing.

Robert E. Seiler, Judge

Donnelly, C.J., Morgan, Higgins and Bardgett, JJ., concur; Rendlen, J., dissents in separate dissenting opinion filed; Welliver, J., dissents and concurs in separate dissenting opinion of Rendlen, J.

SUPREME COURT OF MISSOURI
EN BANC

No. 63433

In re The Marriage of: Alice Toomey,
Appellant,

v.

James Michael Toomey,
Respondent.

Dissenting Opinion
(Filed July 6, 1982)

Married in August of 1976, the parties had lived together 15 months when the wife filed for dissolution on November 16, 1977. Judgment was entered July 30, 1979. During trial, the court noted that the parties had only been "legally ... married about three years" and ruled that evidence concerning appellant-wife's status as a homemaker during their prior marriage was irrelevant to the issue of maintenance. I believe the trial court properly ruled that under § 452.335.1, RSMo 1978, such evidence is not germane to the question of maintenance and accordingly I dissent from the majority's holding that "[u]nder the circumstances before us, evidence of that first marriage is relevant to determine the amount of maintenance and for what period of time." The majority cites no authority for this proposition but bases its conclusion on the notion that the previous conduct (before the 1975 divorce) of the parties, which includes their statuses as may have existed in a prior dissolved marriage, should weigh upon the husband's responsibility to provide maintenance and the wife's corresponding right to receive the same growing out of this marriage of three years' duration and in which merely 15 months passed until the dissolution action was commenced. The prior divorce ter-

minated all rights to aliminy or maintenance for the marriage ending in 1975. The effect of that decree and any obligations for maintenance accruing therefrom ceased with the subsequent marriage in August, 1976. The majority cites no authority and none is suggested demonstrating there can be a tacking on or reaching back to the prior circumstances of divorced parties who later remarry, to provide a relevant factual basis for determining the extent and duration of maintenance arising from dissolution of the second marriage. To justify its conclusion the majority suggests that the fact that children were born of the prior marriage is relevant to the issue of child support renders evidence of the parties' prior status relevant to the current issue of maintenance. This begs the question inasmuch as the continuing duty for child support survives the original divorce as well as the interim period when the parties were not married, the subsequent marriage and the present dissolution. Such is not the case with maintenance (alimony) which arises only from the existence of the marriage beginning in 1976 and terminating in 1979. Similarly the majority recites the fact the proceeds from the sale of the parties' previous Connecticut home was introduced, and concludes this justifies introducing evidence of the "totality of their relationship". It is true that if these proceeds exist as an asset of the parties, their present value (with that of other assets) is relevant to the question of maintenance. However, the readily apparent nexuses connecting (1) the fact six children were born of the prior marriage to the question of child support and (2) the current value of the parties' assets to the issue of maintenance, provide no such link between status in a prior marriage and maintenance stemming from a subsequent dissolution. We may not condemn, as the majority has done, the trial court for properly excluding this evidence as to the parties' circumstances during their first marriage, for such is irrelevant to the issue of maintenance. To the extent it is directed that such evidence be considered on rehearing, I respectfully dissent.

ALBERT L. RENDLEN, Judge

APPENDIX B

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION ONE

No. 42172

Alice Toomey,
Petitioner-Appellant,

vs.

James Michael Toomey,
Respondent-Respondent.

Appeal from the Circuit Court of St. Louis County
Hon. Arthur Litz, Judge

Opinion Filed: June 16, 1981

Petitioner, wife, appeals from a judgment in an action for dissolution. That part of the decree dissolving the marriage has not been attacked and is therefore final. Wife contends that the court erred in (1) limiting the duration of maintenance, (2) ordering that the family residence be sole within six months and the proceeds equally divided, (3) formulating a decree with respect to the payment of the expense of education for the children which is so vague as to be unenforceable, and (4) awarding inadequate sums for maintenance and for child support. We reverse and remand.

The parties had been married for more than twenty years and were divorced in the State of Connecticut in 1975.[1] They remar-

---

[1] The exact date of the original marriage and the date of the divorce do not appear in the record.

ried each other in Missouri on August 31, 1976. Wife filed a petition for dissolution July 24, 1979. Six children were born of the marriage prior to the divorce in Connecticut. Four of the children were minors at the time of the trial in the present action.

Each of the parties is 49 years of age. Respondent, husband, is a licensed physician employed by Washington University at Barnes Hospital and by the City of St. Louis at City Hospital. His gross income is $62,215.46. His monthly take-home pay after deductions which include $19.50 for life insurance and a $329.58 contribution toward a vested pension plan, is $3,300. Wife is employed part-time as a hostess in a restaurant. Her gross income per month is $396.00 and her take-home pay is $314.00 per month. Husband's ordinary living expenses were given as approximately $1,137. Wife's estimate of her ordinary living expenses was $1,569. The cost of support for the four children is not clear. Wife listed $2,181 per month which allotted $691 to educational expenses. Husband stated educational expense as $645.53 per month. Her estimate of expense for the children was incorrect in that it included the cost of food for one of the emancipated children who was living with her.

The marital property of a substantial value consisted of the family residence and husband's interest in a pension plan. The residence has a value of $140,000 to $170,000 subject to deed of trust of $40,000. The Connecticut court had ordered the sale of the residence when the youngest child would have finished high school. However, the parties reconciled and sold the home when they left for Missouri. The monies realized from the sale of that home were used in the purchase of the present residence. Husband's vested interest in the pension plan is valued at $39,849. Husband was indebted to a bank upon a note for $29,400. Other marital property consisted of a checking account, automobile and household furnishings.

Wife had been a registered nurse licensed in the State of Connecticut. She had not practiced her profession for 22 years and her license has apparently expired. She had not been happy in the work and did not intend to follow the profession in the future. The trial court took judicial notice that reciprocity existed between Connecticut and the State of Missouri respecting nurses. Husband testified that refresher courses in nursing were available to persons whose licenses had expired. There was no direct evidence of the status of wife's license, no evidence of availability of position and no evidence with respect to the income a nurse could expect to receive. She testified that she was content with her present employment because it allowed her to be with the children who were still at home.

The trial court awarded maintenance to the wife in the sum of $350 per month for a period of five years. In dividing marital property the court ordered the residence be sold for at least $150,000 within six months and the net proceeds divided equally; husband was awarded the pension fund. The court granted custody of the minor children to wife and made an award of $150 per month as support for each of the four minor children. The court made an additional award for support which reads in part as follows:

> "In addition, Respondent to pay for each child all private school or college tuition and housing costs, said sum to total no less than $665 per month; said sums to be paid directly to the respective educational institutions at such time as Respondent receives statements therefor."

Because we must reverse and remand, primarily because of the award with respect to educational expenses, we shall discuss that issue first.

It is evident that the trial court attempted to fashion a judgment that would accomodate the problem caused by spiraling

educational costs. The judgment however, is not for $665, but requires husband to pay "all private school or college tuition and housing costs." It has been held in this state that a judgment calling for the payment of money must be definite in amount so as to be capable of collection by way of execution. A judgment that is indefinite is void and unenforceable. Loomstein v. Mercantile Trust National Ass'n., 507 S.W.2d 669 (Mo. App. 1974). See also Taylor v. Taylor, 367 S.W.2d 58 (Mo. App. 1963) and the cases collected therein. The provision by the trial court for a minimum payment does not cure the defect of the judgment. The court clearly intended to provide for all of the educational needs of the four children. In spite of the well-intentioned desire of the trial court to make a final disposition of this litigation we must reverse the judgment and remand for further proceedings.

In view of the fact that the various aspects of the dissolution decree are interdependent, we deem it advisable to remand the cause and permit additional evidence to be taken with respect to the nature and extent of marital property, maintenance and child support. See V.M. v. L.M., 526 S.W.2d 947 (Mo. App. 1975).

One issue obliquely referred to by the parties in the briefs is the question of the duration of the marriage. No specific findings of fact were made on the issue yet it appears from comments in the trial that the court, for purposes of maintenance, considered the marriage to have been one of three years duration. This issue has not been determined by the courts of this state and because the case is to be reheard we shall address the issue.

We are of the opinion that in the case of a marriage followed by a divorce and then a remarriage between the same persons, the total number of years of marriage between the parties should be considered. Where, as here, children were born of the

marriage and the wife was the homemaker, the financial, social and employment status of the parties has been influenced by the totality of their relationship. Thus the obligations of both parties carry over into the second dissolution of the marriage.

The issue has been tangentially considered in other jurisdictions in situations similar to that existing in this case. The court in Kantaris v. Kantaris, 169 N.W.2d 824, (Iowa 1969) said:

> "This is not the usual case of a marriage of short duration. The fact that this divorce follows a remarriage of these parties is an important circumstance existing at the time of the second divorce. Plaintiff has three young daughters to look after. This is a circumstance which affects her opportunity for employment, ability to accumulate property and the possibility of remarriage and makes a larger award of property and alimony proper than would be approved in the usual case." *Id.* at 831.

In Whittington v. Whittington, 48 Ala. App. 680, 267 So.2d 472 (1972) where the parties had been married for 29 years, divorced for seven months and remarried for four months the court commented that "the parties were married for twenty-nine years." *Id.* at 476. See also In re Marriage of Reilly, 577 P.2d 840 (Montana 1978) and Davis v. Davis, 59 Cal. Rptr. 788, 437 P.2d 502 (banc 1968).

We are of the opinion that remarriage between the same parties after a divorce is a continuation of the marriage so that "the duration of the marriage" as one of the elements in determining the amount of maintenance, § 452.355.1(4) RSMo 1978, encompasses all of the time during which the parties were husband and wife.

On remand, the parties may also present the court with a more accurate discription of husband's interest in the pension plan.

The cause is remanded to the trial court for further proceeding with respect to child support, maintenance and the division of the marital property.

/s/ JOSEPH G. STEWART, Judge

/s/ ALBERT J. STEPHAN, Jr. Presiding Judge Concurs

/s/ ROBERT G. DOWD Judge Concurs

APPENDIX C

Circuit Court Of St. Louis County
State of Missouri
AMENDED JUDGMENT

IN RE THE MARRIAGE OF:

Alice Toomey — Cause No. 401979

and — Division No. 5

Dr. James Michael Toomey — October 4, 1979

☐ Joint Petitioner
☒ Respondent

Appearances

☒ Petitioner(s) appear(s) in person and by attorney

☐ Respondent remains in default

☒ Respondent appears by attorney

☐ Respondent fails to appear

☒ Respondent appears in person

☒ The Court finds that there is no reasonable likelihood the marriage can be preserved and is therefore irretrievably broken

☒ Decree of Dissolution granted
☐ Decree of Legal Separation granted

☐ Restoration of (former) (maiden)* name of _____ granted

Custody of the minor children awarded to Petitioner-Wife (full name and birthdate of each child)

Maura Toomey	4/16/59
Catherine Toomey	6/24/60
Ann Toomey	12/10/63
David Toomey	5/14/64

Residence of said children shall not be changed from the state of Missouri without prior specific authorization of the Court.

Visitation rights: none

Temporary custody: Reasonable upon reasonable notice

Child Support: (Respondent)* ordered to pay to (Petitioner) (name of each child and amount for each child)

Maura, $150.00 per month, Catherine $150.00 per month, Ann $150.00 per month, David $150.00 per month

In addition, Respondent to pay for each child all private school or college tuition and housing costs, said sum to total no less than $665 per month; said sums to be paid directly to the respective educational institutions at such time as Respondent receives statements therefor. Further, Respondent to pay all medical and hospital expenses for each child in excess of $100 per child per year.

Maintenance: None to Respondent. To Petitioner: $350.00 per month for five years or until she re-marries or dies.

Other orders: Marital Property to Pet-Wife: 1979 Ford Auto and she is to pay off existing mortgage thereon; furniture and furnishings in family home at 1839 Rustic Oak, St. Louis County, Mo.

To Respondent Husband: 1976 Corvette, 1974 Subaru; cash in Pioneer Bank Acct; furniture and furnishings in his apartment; all interest in Teacher Insurance & Annuity Ass'n. at Washington University College Retirement Equity Fund.

Family home known as 1839 Rustic Oak, St. Louis County, Mo. is ordered to be sold by the parties. Same to be listed with Real Estate agent within next 30 days and sold within 6 months. If parties cannot agree on an agent, each party to select one and they jointly handle sale. The minimum sale price for said home shall be $150,000. From net proceeds of the sale proceeds to be equally divided between Petitioner and Respondent.

Respondent shall pay all mortgage payments and reasonable utility bills respecting said family home for a period of six months from the date hereof or until said home is sold, whichever shall first occur.

☒ The (Parties) represent to the Court that no other marital property or separate property remains to be apportioned by the Court.

☒ (Respondent)* is ordered to pay to Petitioner's Atty, Stuart Cofman the sum of $1200.00 as and for attorneys fees and the sum of $100.80 as and for expenses.

Costs taxed against (Respondent) (Husband)

☐ Separation Agreement filed marked exhibit _____ and found to be conscionable.

☐ Separation Agreement to be incorporated in and made part of decree.

☐ Parties are ordered to perform the terms thereof.

☐ Circuit Clerk ordered to file for record a certified copy of the decree in the office of the Recorder of Deeds in the County of _____ State of _____ where the real estate is situated.

Charles Seigel Signature of Respondent's Attorney	Stuart Cofman Signature of Petitioner's Attorney
722 Chestnut St. Address	314 N. Broadway Address
63101 Zip	63102 Zip
_____ Phone	_____ Phone

Extra copy requested to be mailed to: _____
(Name) (Address)

*Strike words not applicable

SO ORDERED /s/ Arthur Litz
Judge

Office - Supreme Court, U.S.
FILED
NOV 26 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-755

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALICE TOOMEY,
Respondent,

vs.

JAMES MICHAEL TOOMEY,
Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Missouri

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QUESTIONS PRESENTED

Does the Decision by the Missouri Supreme Court which recognizes that the length and nature of a prior marriage between the same parties whose remarriage is being dissolved is a relevant and material fact, among many, to consider in determining an award of maintenance and in dividing marital property, create an arbitrary and irrational classification of domestic relations litigants in violation of the Equal Protection provision of the Fourteenth Amendment to the United States Constitution?

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CONSTITUTION AND PROVISIONS CITED

U. S. Constitution, Amendment Fourteen, Section 1 . . 3,7,10,11

Section 452.330 R.S.Mo. 3,8

Section 452.335 R.S.Mo. 4,7,8

No. 82-755

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALICE TOOMEY,
Respondent,

vs.

JAMES MICHAEL TOOMEY,
Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Missouri

Respondent, Alice Toomey, for the reasons hereinafter set forth opposses the Petition for Writ of Certiorari and requests that the Court deny the same.

SUPPLEMENTAL STATEMENT OF THE CASE

Respondent adopts Petitioner's Statement of the Case with the following additions.

The evidence showed that the Petitioner, James Michael Toomey, was a licensed physician, and as of the time of the trial was employed by Washington University at Barnes Hospital. He was also employed as a physician part-time by the City of St. Louis. His gross monthly income from employment was Five Thousand Six Hundred Fifty-Two Dollars ($5,652.00). The evidence further showed that Respondent, Alice Toomey, at one time had been licensed as a registered nurse but had not

worked as a nurse for approximately twenty-two (22) years. At the time of trial, she was neither registered nor licensed to practice nursing in any state. At the time of trial, she was employed part-time as a hostess at Calico's Restaurant in Chesterfield, Missouri. Her gross pay per month was some Three Hundred Ninety-Four Dollars ($394.00). Their first marriage of over twenty (20) years ended in divorce in Connecticut. Within approximately a year they were remarried on August 31, 1976 in Missouri.

On appeal she challenged the child support Judgment as to whether it was enforceable, the maintenance award, and the division of property. With respect to the maintenance award she raised two (2) primary issues. First, she contended that the Circuit Court erred in providing that the maintenance should terminate after the expiration of five (5) years, rather than making the same for an indeterminate period since there was no evidence in the record concerning what the parties future financial condition would be or that there would be any expected change in the future. Secondly, she contended that the amount of the award was inequitable and inadequate under the totality of the circumstances. In this regard, she raised the refusal of the Circuit Court to considering the totality of her relationship with Dr. Toomey, including the length of their first marriage and the fact that during the majority of this period she had not been employed but had been a wife, mother and homemaker.

On August 23, 1982, the Missouri Supreme Court overruled Petitioner's Motion to Stay the issuance of its mandate pending the filing and ruling on a Petition for Writ of Certiorari with this Court. The mandate has issued to the Circuit Court of St. Louis County and further proceedings are now pending there.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment XIV, Section 1. The said United States Constitution, Amendment XIV, Section 1 provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 452.330.1 R.S.Mo. 1978. The said Section 452.330.1 R.S.Mo. 1978 provides:

> 1. In a proceeding for nonretroactive invalidity, dissolution of themarriage or legal separation, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall set apart to each spouse his property and shall divide the marital property in such proportions as the court deems just after considering all relevant factors including:
>
> (1) The contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker;
>
> (2) The value of the property set apart to each spouse;
>
> (3) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children; and

(4) The conduct of the parties during the marriage.

Section 452.335 R.S.Mo. 1978. The said Section 452.335 R.S.Mo. 1978 provides:

1. In a proceeding for nonretroactive invalidity, dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order to either spouse, but only if it finds that the spouse seeking maintenance

(1) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and

(2) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

2. The maintenance order shall bein such amounts and for such periods of time as the court deems just, and after considering all relanvant factors including:

(1) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(2) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(3) The standard of living established during the marriage;

(4) The duration of the marriage;

(5) The age, and the physical and emotional condition of the spouse seeking maintenance;

(6) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance; and

(7) The conduct of a party seeking maintenance during the marriage.

ARGUMENT IN OPPOSITION TO THE GRANTING OF THE WRIT

I

This Court Should Deny The Petition For Writ Of Certiorari In That Domestic Relations Are Matters Falling Within The Purview Of The States To Regulate, No Substantial Federal Question Has Been Presented, And The Decision By The Missouri Supreme Court Which Recognizes That The Duration Of A First Marriage To The Same Party Is A Material And Relevant Fact To Consider In Determining An Award Of Maintenance And In Dividing Marital Property Does Not Arbitrarily Or Irrationally Otherwise Discriminate Between Domestic Relations Litigants.

This case presents no federal question or matters of federal law. At issue is the amount of maintenance (alimony) to which Respondent is entitled and how the marital property should be divided and apportioned upon the granting of a Decree of Dissolution of their marriage (divorce). Such are matters purely of state concern within the powers of the several states to regulate and fall beyond the purview of the laws of the United States.

Thus, it has long been held and recognized that federal courts must decline to assert jurisdiction over divorce cases unless a substantial federal question is present. See *Hisquierdo* v. *Hisquierdo,* 439 U.S. 572, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979). Even if a federal question is present, there must be more than a mere conflict. In the *United State* v. *Yazell,* 382 U.S. 341, 352, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966), this Court recognized that "state family and family property law must do 'major damage' to 'clear and substantial' federal interests before the supremacy clause will demand that state law be overridden." Only the state courts, and not the federal courts have the jurisdiction and the authority to determine the amount of maintenance to which

Respondent should be awarded and how the marital property, which had been acquired, should be divided and apportioned. This is so even if Certiorari be granted. See *Stanton* v. *Stanton*, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975).

Petitioner would contend, however, that the decision of the Missouri Supreme Court in its interpretation of Section 452.335 R.S.Mo. has created an arbitrary and irrational classification of litigants which does not bear a fair and substantial relation to the purposes of maintenance award. In his view, all other factors being similar, there should be no distinction between a person seeking to dissolve a second marriage with their original spouse as distinct from a person simply seeking to dissolve a second marriage to a stranger. Thus he contends he has been placed in a separate and different class of litigants which is totally unrelated to the purposes of the statute in violation of the Fourteenth Amendment to the Constitution. There is, as shown below, a substantial difference.

In order to determine whether this case presents a violation of the Equal Protection Clause of the Constitution requires a two-prong analysis. First, has the Missouri Supreme Court actually created two distinct and separate classification of litigants who will be treated differently. Secondly, if so, is there a reasonable basis for the classification which is not arbitrary and which rests upon a ground of difference having some fair and substantial relation to the object of the legislation. See, *Reed* v. *Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971); *Stanton* v. *Stanton, supra.*

Contrary to the contention of Petitioner, the opinion by the Missouri Supreme Court has not created two different classes of domestic relations litigants. Rather, all that the Supreme Court has recognized is that each domestic relations case as to awards of maintenance and the division of property must be decided upon its own individual facts and circumstances. In Missouri, a divorce or dissolution proceeding is an action at law, "sui

generis". Nevertheless, the courts have long held that it partakes of the nature of a suit in equity in which a court is to apply equitable principles. *State ex rel. Couplin* v. *Hostetter,* 129 S.W.2d 1 (Mo. 1939); and *In Re: the Marriage of Breen,* 560 S.W.2d 358 (Mo. App. 1977).

Thus, the Missouri Supreme Court, has simply recognized that in applying the equitable principles, that if there has been a prior marriage between the same parties such fact is one more relevant fact which should be considered by the Missouri trial courts in determining what constitutes a fair and equitable division of the marital property and in determining what constitutes a fair and equitable award of maintenance (alimony) under the circumstances. Petitioner argues, a prior marriage, whether to the same spouse or to a stranger, is a totally irrelevant and immaterial fact since §452.335.2(3) and (4) only refer to the duration of and to the standard of living established during the present marriage. Thus he contends that what has occurred and what has been the situation of either of the parties prior to the present marriage simply has no relevancy on how marital property should be divided or on an award of maintenance. Such position, however, misinterprets and misapplies Missouri law and ignores the realities of life.

The Missouri Supreme Court simply recognized that the enumerated factors set forth in the statutes as to what should be considered by the Court in dividing the marital property and in awarding maintenance are not exclusive.[1] Rather, since the enumerated factors are preceeded by the words "as the Court deems just, [and] after considering all relevant factors including:" the Courts have long recognized that they are not words of limitation. See *Lockett* v. *Lockett,* 558 S.W.2d 387

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[1] These statutes are §452.330 R.S.Mo. (division of property); and §451.335 R.S.Mo. (maintenance).

(Mo. App. 1977). Also see, *Poague* v. *Poague,* 579 S.W.2d 822 (Mo. App. 1977). The opinion by the Missouri Supreme Court in this case has only reaffirmed what has long been Missouri law, to-wit: That the Courts are to consider the totality of the relationship and situation of the individual parties before it. No separate classification of litigants has thus been created. Rather each case, as any equity matter, must be decided and determined upon the individual facts, circumstances and merits presented.

Contrary to Petitioner's statement, the basis for an award of maintenance is more than to simply to provide "subsistance for the spouse". His citation to *Dyche* v. *Dyche,* 570 S.W.2d 293, 296 (Mo. Banc. 1978) has been taken out of context. That case simply recognized that maintenance, as contrasted with old law prior to the reform in 1974, no longer includes awards for attorney's fees and debts owing to third parties. These are awarded separately. Even though there is a new emphasis on self sufficiency and awards of maintenance are not made to punish, nevertheless, Missouri Courts also recognize that in the interests of social welfare and justice, one purpose of maintenance is to permit a spouse to maintain a similar standard of living as that previously enjoyed, in so far as the finances of the parties allow. See *Phelps* v. *Phelps,* 620 S.W.2d 462 (Mo. App. 1981).

But most importantly, despite Petitioner's characterization, there is a rational and significant difference between a remarriage to the same spouse and second remarriage which is to a stranger. The past has meaning. It cannot be negated. During the first marriage a standard of living is created and established. Children may be born and raised. Then marital difficulties result in a divorce. Precisely what the marital difficulties are and what the reasons are for a remarriage between the parties may vary from case to case. The remarriage between the parties may be due to numerous inducements, representations and promises to correct prior behavior which resulted in the divorce. Such factors will not be present when there is a second marriage to a stranger.

The precise reasons why the parties here were originally divorced and why they remarried is not shown by the record. But, they did remarry within a year. There was no intervening marriage. During their first marriage they had six (6) children. Respondent gave up her career and profession as a registered nurse. Instead, she devoted long years to Petitioner as a wife, mother and homemaker. Upon their remarriage, Respondent continued to be the wife, mother and homemaker. These facts all should intertwine to determine what constitutes a "reasonable" award of maintenance and a "fair and equitable" division of property.

Missouri is not the first state to hold or to recognize that a prior marriage between the same parties can and should be considered. See *Kantaris* v. *Kantaris*, 169 N.W.2d 824 (Iowa 1969); *Whitting* v. *Whitting*, 267 S.2d 472 (Ala. 1972); and *In Re: the Marriage of Reilly*, 577 P.2d 840 (Mont. 1978). In contrast, a second marriage between two strangers presents a totally different and distinct factual and emotional situation.

The decision by the Missouri Supreme Court is not arbitrary or irrational. There has been no violation of the Equal Protection Clause.

CONCLUSION

Petitioner is obviously dissatisfied with the mandate and opinion of the Missouri Supreme Court. But, the factors which are to be considered by a Court in awarding maintenance and in dividing marital property are purely questions of state law and are beyond the power of the federal courts to regulate or to determine. A rational basis exists for a court to also take into consideration the totality of the relationship which has existed between the parties which can include the fact and the duration of a prior marriage between them. A dissolution of a second marriage to a stranger presents an entirely different situation. The factual situation of this case does not present any violation of the Equal Protection Clause. Certiorari should be denied.

Respectfully submitted,

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